

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Trifocal LLC,  
v.  
Plaintiff,  
e-centives, Inc.,  
Defendant.

NO. C 03-05413 JW

**FINAL PRETRIAL CONFERENCE  
ORDER**

On January 11, 2006, the Court conducted a final pretrial conference, pursuant to which the Court issues the following order:

A. Trial Schedule

1. The parties have agreed to a bench trial in this case. The trial schedule will be as follows:
  - a. The first two sessions shall begin on January 26, 2006 from 9 am - 12 pm and 1 pm - 4 pm.
  - b. The trial shall continue with the following sessions: January 27 from 9 am - 12 pm and 1 pm - 4 pm; January 31 from 9 am - 12 pm and 1 pm - 4 pm; February 1 from 9 am - 12 pm and 1 pm - 4 pm; February 8, 9 and 10, from 9 am - 12 pm and 1 pm - 4 pm.
  - c. The parties shall argue and submit in the afternoon session of February 10, 2006.

## **B. Findings of Fact and Conclusion of Law**

2       2. The parties shall file and serve proposed findings of fact and conclusions of law no later  
3 than **January 19, 2006**.

**C. Exhibits**

5       3. On the day before the first day of trial, each party shall lodge with Chambers an exhibit  
6 binder for each witness, which shall contain all exhibits which the party contemplates offering into  
7 evidence through the witness. Any party objecting to an exhibit shall insert a page in front of the  
8 exhibit which identifies the party making the objection and the legal ground for the objection.

9 Although an exhibit to which an objection has been made may be shown to the witness, it shall not  
10 be displayed to the trier of fact unless the objection is overruled and the exhibit is received into  
11 evidence.

12        4. If the case involves only a few exhibits, instead of witness exhibit binders, the parties may  
13 include all exhibits in a single notebook.

14           5. Unless otherwise ordered, all exhibits shall be in a format compatible with either the  
15 video or digital evidence presentation system utilized by the Court for display after it is received into  
16 evidence.

17       6. The parties are encouraged to stipulate to the admission into evidence of all exhibits. If  
18 the parties stipulate to admissibility, the parties shall indicate, "I am going to show you Exhibit \_\_,  
19 which is in evidence by stipulation." The exhibit may be shown to the witness and the trier of fact  
20 without being formally offered into evidence.

21       7. The proffering party shall retain custody of all exhibits, schedules, summaries, diagrams  
22 or charts to be used at the trial.

#### D. Trial Procedure

24        8. In opening statements and in arguments, counsel shall not express personal knowledge or  
25        opinion concerning any matter in issue.

26        9. Counsel must question witnesses from the podium, using the microphone. Without  
27 requesting permission, counsel may approach witnesses for any proper purposes.

10. Address all remarks to the Court, not to opposing counsel.
11. Refer to all persons, including witnesses, other counsel and the parties by their surnames  
3 and not by their first or given names.
12. No demonstrative exhibits, charts, diagrams or enlargements shall be used at trial unless  
5 previously disclosed to opposing counsel.
13. In examining a witness, counsel shall not repeat or echo the answer given by the witness.
14. Counsel must stand when making an objection. When objections or responses to  
8 objections are made, only the legal basis of the objections and responses may be stated.
15. Conferences at the bench or sidebar are not favored by the Court. Any sidebar  
10 conferences which are allowed will be off the record. If any counsel wishes to place matters on the  
11 record, he or she may so request, and the Court will make a responsive order.
16. Counsel have full responsibility to arrange for the appearance of witnesses during the  
13 presentation of their case so as to eliminate delay caused by waiting for witnesses who have been  
14 placed on call by counsel.
17. Unless an agreement to the contrary is entered into by opposing counsel, all nonparty or  
16 nonexpert witnesses will be excluded from the courtroom when not testifying. When a witness has  
17 completed his or her testimony, the witness is excused unless counsel indicates that he or she wishes  
18 the witness to remain subject to being recalled. Any witness who has been excused from further  
19 testimony may remain as a spectator. It will be the responsibility of counsel to make an  
20 announcement at the time the witness steps down that he or she should remain in the environs of the  
21 Court for a reasonable time to permit such counsel an opportunity to secure and serve a subpoena  
22 upon the witness and assume responsibility for his or her per diem and other expenses as provided  
23 by governing rule or statute.
18. Counsel shall admonish all persons at counsel table that gestures, facial expressions,  
25 audible comments, or the like, as manifestations of approval or disapproval during the testimony of  
26 witnesses, or at any other time, are prohibited.

1       19. Counsel should never ask the Court reporter to mark or flag a witness's answer to a  
2 particular question. Instead, make a note of the time and subject matter of the testimony you want  
3 marked, and inform the reporter unobtrusively at the next recess.

4       20. Witness examination shall consist of direct examination, cross-examination and re-direct  
5 examination. No recross-examination will be allowed without prior approval of the Court  
6 specifically indicating the area for recross-examination. When there are multiple defense counsel,  
7 they are directed to confer and designate to the Court the sequence in which they wish to be  
8 recognized during trial for purposes of presenting opening statements and conducting cross-  
9 examination of witnesses. If one counsel conducts the direct examination of a witness, that same  
10 counsel must make objections when the witness is cross-examined. Counsel who will conduct the  
11 cross-examination should object while the witness is on direct.

12       21. From and after the moment the case is called for trial, any objection, motion or other  
13 application for relief made by any defense counsel, orally or in writing, shall be deemed to be  
14 adopted and joined in by every other defendant, without announcement by counsel to that effect, and  
15 the rulings of the Court shall be deemed applicable to each defendant unless otherwise stated at the  
16 time the ruling is made. Accordingly, it shall be regarded as unnecessary and improper for counsel  
17 to rise to "join in" an objection or motion. Rather, counsel should rise to be heard only for the  
18 purpose of expressly opting out of an objection or motion if that is his or her position.

19       22. Counsel are directed to deliver to opposing counsel at the end of each trial day (if not  
20 earlier) a list of witnesses counsel anticipates calling the next trial day.

21       23. Counsel calling a non-client witness to testify should have no further discussions with  
22 that witness concerning the case or any aspect of his or her testimony after the witness has been  
23 tendered for cross-examination and until such time as the witness has been tendered back for redirect  
24 examination. At all other times, within the bounds of governing ethics and the law, counsel may  
25 engage in discussions with witnesses during trial.

26

27

28

1        24. It is the practice of the Court periodically to inform counsel of the Court's record of how  
2 much time each side has remaining for the presentation of evidence based upon the stipulated trial  
3 schedule.

## G. Daily Trial Transcript

5        25. Any counsel desiring daily or expedited transcripts during trial should make immediate  
6 arrangements with the court reporter and should inform the Court and other counsel of such  
7 intentions.

9 || Dated: January 11, 2006

JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Frank R. Ubhaus [fru@berliner.com](mailto:fru@berliner.com)  
3 James W. Lucey [jlucey@carr-ferrell.com](mailto:jlucey@carr-ferrell.com)  
3 James W. Lucey [jlucey@carr-ferrell.com](mailto:jlucey@carr-ferrell.com)  
4 John F. Domingue [jfd\\_esq@yahoo.com](mailto:jfd_esq@yahoo.com)

5 **Dated: January 11, 2006**

Richard W. Wiking, Clerk

6 **By: /s/ JW Chambers**

7 **Melissa Peralta**

8 **Courtroom Deputy**